



Sir Alan Moses keynote speech to Conference5RB 29 September 2016

The law is I fear all too replete with tradition; ancient professions find it all too difficult to shake off its shackles. Even as forthright and omniscient a set of Chambers as 5RB cannot resist a conference embracing that most important if sometimes, to the uninitiated opaque of legal fields, the acres of media law. And of course its inevitable harbinger, its morning lark – the keynote speech.

Judges, and I was a judge, are no strangers to the keynote speech. I think they thought it was easy to say a few words of good cheer and immoderate praise for their hosts, peppered with their pet irritation – some complaint about the length of skeleton arguments or overload of cases in the court of appeal – before they scurried away to court leaving their listeners to get on with the real work of the day.

Sometimes I found it was not as easy as you might think. After all what was the key in which you were supposed to sing at so early an hour and what note were you supposed to hit? As he or she struggled to lift the spirits of those who were about to embark on a day of jurisprudential complexity, the speaker was met by the shuffling and rattling, the muffled jangle of coffee cup and chair of the latecomers blearily seeking that most precious of treasure – not enlightenment – no the CPD points, those points without which the listener could not continue to practice in his or her profession.

What a contrast with that most oxymoronic of pursuits, the regulation of the press. IPSO, now it has completed two years and has started its third is not regulating a profession. It cannot admit or expel journalists or editors, it does not police a licence by which the press are permitted or forbidden to publish. Above all it does not award points.

Regulators like to measure the regulated. Some of you may remember the somewhat fanciful attempt of the statutory regulator to measure the performance of advocacy – forlorn hope and rightly failed – but how do you measure the performance of the press when so much depends on the prejudice of the reader? It is a matter for their taste not for regulation whether they enjoy the bias, the unfairness, the bullying, and the cruelty – or for the persistent investigation in the face of obstruction and protest from the powerful, from government, from the police and from community representatives (I am thinking of Andrew Norfolk's resolution for four years in the teeth of obstruction

at Rotherham) – the sympathy, the revelation which can change people's minds and change people's hearts, In short, the tone and taste of the story.

Regulation needs to do what it can to underline the importance and authority of journalism. Of course there is a price to pay, the cost is that newspapers will do what they have always done, pander to the prejudice of their reader whose tastes and interests in stories it is their skill to anticipate. That is, after all, what we both love and loathe about them. If they repeat what we think, they are respectable and worthy, then we will read them and support them. If they publish what we find trite or even hateful, above all what we ourselves do not accept or believe, we will condemn them.

Our views of the newspapers depend upon our own views, and they are as crooked as the *crooked timber of humanity from which no straight thing was ever made*. When you look at the ideal of virtual regulation and compare it with the reality of regulation, it is as well to remember Montaigne: *the taste of goods or evils doth greatly depend on the opinion we have of them*, because, after all, we have to admit, we love a story, we love a story because it excites, amuses and titillates our fancy, we love stories which cultivate our own prejudices and our own beliefs, above all we love stories because they are not boring.

Regulation suffers as we all suffer from the insidious and persuasive belief which permeates our audit society that everything is capable of audit, that everything is capable of measurement. The statistics we keep provide an only partial guide. We can see of the contacts, over 8000 this year, many do not raise issues of breaches of code but which most complained about – accuracy and *discrimination*

Discrimination. What does Clause 12 of the Editors' Code mean? It is focused on individuals and cannot mean that every time pejorative remarks are made about a group in general because individuals are members of the group, there is a breach. Such interpretation causes understandable anguish to all members of that group. Interpretation permits criticism and condemnation but avoids targeting an individual in a pejorative way by reason of race and religion.

A press regulator does at least share this characteristic with other regulators, whether statutory or not – the need to stand between the regulated and those who require protection and the objective not only of providing protection but of seeking to modify behaviour. One thing I have learnt in the two years of the life of IPSO is that neither will be achieved by confrontation. Far more will in time be gained by persuasion and all the lawyers here know that shouty repetitive advocacy is unlikely to persuade anyone.

All too easy to forget that the achievement of Leveson was for the first time the vast majority of the press agreed to enter a contract. Binding obligation, enforceable in court. What is success? Yes, a change in attitude to regulation but the imponderable questions are those you face daily, questions to which

there is no obvious answer. The only often bewildering truth is that two answers diametrically opposed are both reasonable and justifiable: issues of reasonable expectation of privacy; reporting of suicide in a public court; of opinion pieces based on misleading statistics; grappling with the concept of public interest which properly defies definition lest it fall within a straitjacket which cannot cope with unforeseen circumstance.

And even the role of adjudication may conflict with regulation. We are criticised for giving time for press to reach agreement with complainant, a max 28 days. When we know of a complaint, we can assist at any time but if the result is satisfactory to complainant, we won't interfere and will only adjudicate once it is clear there is no agreement. It does mean we will not always know what result was but the alternative is for press to refuse to settle quickly and dig heels in – back to the bad old days of delay and obfuscation.

And of course there is a danger in figures. If a complainant cites 12 different breaches of accuracy and the newspaper successfully defends eleven of those but admits one, immediately publishing a correction-- that is recorded as an upheld complaint, however minor the inaccuracy might have been. Publications quite understandably complain to me that such a result is unreasonable.

And where a complaint is settled with a correction agreed by complainant then it is not a reasonable basis for complaining absence of due prominence. There perhaps is the current focus of criticism. Not equal, the word *due*, as in due process and due prominence, is a weakly word that raises questions as to what the circumstances are which dictate appropriate position of correction. It is not coherent merely to say that in every case a correction must be equally prominent. Sure, that is what many complainants would like to see but decisions of committee cannot be dictated solely by what one side want any more than by the newspapers vast majority of whom we regulate. The purpose is not to punish but to make sure anyone reading knows of the correction and to dictate nature of that correction. It is not a facile exercise, as those who do not have to provide regulation believe.

Who do we represent? We represent the public and that is not the same as victims whom we seek to protect. And privacy complaints remind us that freedom of expression includes and embraces the freedom to enter into private relationships.

IPSO has introduced a pilot scheme of arbitration to which all the national newspapers have signed up. To see whether it works it needs to be deployed. It is a practical system not all paid for by some mysterious wealthy source but to a large measure by the regulated press, rather a system where greatest cost is on the newspaper.

IPSO is not concerned and is indifferent to the process of recognition, a process which Leveson would never have foreseen or recognised. All I will say

is that, whilst I have the utmost respect for David Wolfe whom I have known ever since he joined the same Chambers, the process will lead to dispute and litigation with which the public will have no interest and which will last a long time – long beyond the time when the press will have to be persuaded to enter into a new contract with the regulator. After all, the PRP has a powerful interest in recognising someone if it is to continue to earn taxpayers' money.

Recognition was a process designed to provide for the public an assessment of how the press regulator was doing, how well it was performing its function. It was never designed as a mere machinery to ensure that the statutory goad of Section 40 of the Crime and Courts Act would drive the press into the corral of the Charter. The press do not like to be goaded. Nor was the process of recognition ever designed to enable an organisation to be recognised when it was performing no other function than machinery to give effect to the statutory provisions of s.40. But that is not a matter for IPSO.

But IPSO will provide the assurance of independent assessment when the report of a truly distinguished and independent former Permanent Secretary Sir Joseph Pilling is published next month. This will be a thorough and dispassionate review of how IPSO works, of its failures and of its successes.

I still believe that unedited babble is not the same journalism as the journalism of all the press we regulate, that the public need and deserve the assurance of regulation from which the authority of a regulated but untamed press depends.

No-one can do this job unless they enjoy it (the miserable judge was the bad judge) and unless they believe in it. I do.